IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.273 OF 2006
IN
SUIT NO.101 OF 1993

Chhaganlal Haribhai Kesur. ..Plaintiff.

V/s.

P.Pushparani & Anr. ..Defendants.

And

Naresh O. Jain & Anr. ..Applicants.

Mr.V.A.Thorat, Sr.Advocate a/w. Mr.Bharat Vaishnawa i/b. Bharat Vaishnawa & Co. for Plaintiff.

Mr.B. Saraf i/b. Krishna Tanna for Applicants.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 14, 2007.

P.C. :

1. By this Motion, the third party Applicants pray that the Order dated 28th June, 1999 passed in Notice of Motion No.1313 of 1996 in Suit No.101 of 1993 appointing Court Receiver in respect of the property being Final Plot No.26 of Town Planning Scheme No.2, Santacruz bearing CTS No.1034 in the Village Juhu, Taluka Andheri in the registration and sub-registration District of Mumbai City and Mumbai suburban, be recalled.

2. According to the Applicants, the said Order appointing Court Receiver dated 28th June, 1999 has been passed in absence of any contest from the Defendants. Whereas, the documents on record now placed before this Court by the Applicants would go to show that the Applicants have right, title and interest in the Suit property and that the Defendants in the Suit have no valid title therein. This submission is canvassed relying on the Agreement executed between the original owner of the Suit property Siddik Haji Abdulla in favour of the Classic Construction, a partnership firm dated 19th July, 1979. That is a registered Conveyance Deed. The copy of the Registered Conveyance Deed is placed on record in the compilation at page-8. The document pressed into service on behalf of the Applicants also indicates that the partners of the said Classic Constructions, transferred their right, title and interest in the Suit property by two separate Agreement dated 15th November, 1986 and 7th April, 1988 in favour of the Applicant No.2 herein. The Applicant No.2 in turn transferred that right in favour of the Applicant No.1 by Agreement dated 26th September, 2004. The later Agreements between

Classic Construction and Applicant No.2 as well as Applicant No.2 and Applicant No.1 are unregistered documents. Indeed, by registered Confirmation Deed dated 31st August, 2005 executed by the Classic Construction in favour of the Applicant No.1 to which the Applicant No.2 is a Confirming party, the property referred to above stood transferred in favour of the Applicant No.1. The fact remains that in August, 1989, the said Siddik Haji Abdulla had no subsisting right, title and interest in the Suit property; for which reason, P.Ayyapalam Nadar who claims through the original owner Siddik Haji Abdulla could not have created charge in respect of the Suit property at Juhu. In other words, if the Registered Conveyance Deed dated 19th July, 1979 pressed into service on behalf of the Applicants is to be accepted as it is, as there is no challenge to the said document so far, the Applicants are right in contending that neither the original owner Siddik Haji Abdulla nor the said P. Ayyapalam Nadar who claims his title through the original owner Siddik Haji Abdulla, could have dealt with the Suit property on 15th August, 1989.

3. I am conscious of the fact that the Plaintiff has raised several issues to doubt the transaction in

favour of the Applicants. The fact remains that there is registered Conveyance Deed dated 19th July, 1979 and that document has not been challenged so far by any one, much less, the Plaintiff before this Court. So long as the said registered Conveyance Deed is to operate, it will necessarily follow that the Plaintiff cannot claim any right in relation to the Suit property which is founded on the document executed on 15th August, 1989. On this reasoning alone, the Applicants ought to succeed in their claim in the present Application.

4. There is another reason rightly pressed into service on behalf of the Applicants that even assuming without admitting that the Agreement dated 15th August, 1989 executed by P.Ayyapalam Nadar in favour of the Plaintiff is valid document and also passes the rights in favour of the Plaintiff, even so on reading the said document as a whole, in particular Clause-3 and 4 thereof, it is more than evident that it is only a transaction of charge with regard to the specific fund to be generated by the debtor by way of sale price on realisation of the said property/land or over the said property/land without possession in terms of Section 100 of the Transfer of Property Act, founded on the basis of

Agreement for sale dated 17th November, 1988 read with another Agreement dated 9th February, 1989 executed between Siddique Haji Abdullah(Original owner of the Suit plot) Vendor of the One Part and P.Ayyapalam Nadar, debtor called as "Confirming Party" of Second Part and M/s. Meenaz Housing Corporation, called as purchaser. In other words, the Plaintiff has claim of charge in relation to the specific fund out of sale proceeds referable to the Agreement dated 17th November, 1988 and 9th February, 1989. The Plaintiff has no right with regard to the Suit property as such.

5. In so far as the claim of charge is concerned, that is in relation to the sum of Rs.9(nine) Lakhs paid by the Plaintiff to said P.Ayyapalam Nadar. At best, the Plaintiff can be heard to contend that their interest in relation to the recovery of said amount alongwith the accrued interest at the rate of 18 percent be secured.

6. Counsel for the Applicants in all fairness has restated their stand, which they had taken on the earlier occasion that without prejudice to their rights and contentions, they were willing to secure the Suit claim of the Plaintiff in relation to the

Juhu property, which is in the principal sum of Rs.9(nine) Lakhs with interest at the rate of 18% thereon. The Applicants submit that they would deposit a sum of Rs.38,68,450/-(Rs.Thirty eight lakhs sixty eight thousand four hundred & fifty only) in this Court within three weeks from today, which can be made as condition for passing of this order of setting aside the earlier Order passed by this Court appointing Court Receiver in respect of the Suit property(Juhu property).

7. In the circumstances, I have no hesitation in allowing this Notice of Motion in terms of prayer clause (a) on condition that the Applicants would deposit sum of Rs.38,68,450/-(Rs.Thirty Eight Lakhs Sixty Eight Thousand Four hundred & Fifty only) in this Court within three weeks from today, which amount will be invested in a Nationalised Bank initially for a period of five years, to be renewed from time to time till the disposal of the Suit, or till such order to be passed by this Court at the appropriate stage. The said amount shall be disbursed depending on the ultimate finding to be recorded by this Court in the pending Suit.

8. Needless to observe that the view taken in

this order is on the basis of documents relied upon by the Applicants. All questions relating to the title of the Suit property, to be considered in the appropriate proceeding on its own merits in accordance with the law.

9. Notice of Motion disposed of on the above terms.

10. At the request of the Counsel for the Plaintiff, it is observed that this Order shall not be given effect to for a period of two weeks to enable the parties to consider possibility of settlement of entire claim in relation to Juhu property.

(A.M.KHANWILKAR,J)